UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VW CREDIT, INC.

and Case 13-CA-158715

KELLEY HELLMAN, AN INDIVIDUAL

VOLKSWAGEN GROUP OF AMERICA, INC.

and Case 13-CA-166961

KELLEY HELLMAN, AN INDIVIDUAL

VOLKSWAGEN GROUP OF AMERICA, INC.'S AND VW CREDIT, INC.'S RESPONSE TO THE GENERAL COUNSEL'S BRIEF

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INTRODUCTION

The parties have now filed their opening briefs in this matter. In the General Counsel's Brief to the Board, the General Counsel argues that the Agreement[1] violates the Act, that the Notices failed to repudiate the Agreement's unlawfulness, and that the Amended Agreement continues to violate the Act (despite that it contains the express statement, "[t]his Agreement does not restrict your rights to file charges with the NLRB"). Volkswagen believes that its Opening Brief anticipated and responded to each of the General Counsel's arguments, save one, to which it responds here.

In arguing that Volkswagen's repudiation was not specific or that it did not assure employees that Volkswagen will not interfere with their rights in the future, it appears that the General Counsel intends to argue something different: that Volkswagen's repudiation is legally insufficient because Volkswagen failed to admit wrongdoing in the Notices. The General Counsel states that "Respondents fail to admit that the policy violated the Act at all," that "Respondents must [] take responsibility for" their "violation" of the Act, and that "in place of an admission, Respondents instead offered an exculpation." (Gen. Counsel Br.[2] at 6.)

The flaw with the General Counsel's argument is that no element of the *Passavant* test requires an employer to admit wrongdoing. To the extent that other Board decisions purport to find such a requirement in *Passavant*, they misapply *Passavant* and the Board should not follow them. Moreover, those decisions should be distinguished from this case based on their facts. Finally, any purported requirement that the employer admit wrongdoing is belied by the cases in which the Board found repudiations to be effective despite the lack of any such admission by the employer.

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[1] The terms and abbreviations herein have the definitions ascribed to them in Volkswagen's Opening Brief.
[2] The General Counsel's Brief to the Board, filed January 9, 2017, is abbreviated as "Gen. Counsel Br." herein.

ARGUMENT

I. VOLKSWAGEN NEED NOT ADMIT WRONGDOING TO MAKE ITS REPUDIATION EFFECTIVE.

A. Nothing in *Passavant* Requires Employers to Admit Wrongdoing.

Nothing in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), the case that established the Board's test for repudiation, expressly requires an employer to admit wrongdoing in order to repudiate past unlawful conduct. *Passavant* announced a multi-part test involving as many as seven elements by the count in Volkswagen's Opening Brief. (Volkswagen Br.[3] at 14.) If the Board had wanted to require an admission of wrongdoing as one of the elements, it easily could have done so. But not one of the *Passavant* elements requires admitting wrongdoing. The two elements cited by the General Counsel require only that the employer *specifically identify* the conduct being repudiated—which need not involve admitting that the conduct was unlawful—and that the employer *promise not to interfere with employee rights in the future*—which need not involve admitting that the employer's past conduct was unlawful. And the remaining elements of the *Passavant* test do not support the General Counsel, either: a repudiation can be timely, unambiguous, free from other illegal conduct, adequately published, and untainted by any subsequent unlawful conduct, all without the employer admitting that the conduct at issue violated the Act.

As explained in Volkswagen's Opening Brief, the Board cannot apply its rules in a manner that is contrary to their language. *E.g.*, *Titanium Metals Corp. v. Nat'l Labor Relations Bd.*, 392 F.3d 439, 448-50 (D.C. Cir. 2004) (overturning Board where Board failed to properly apply own rule regarding whether grievance settlement was "fair and regular," instead "act[ing] on whim" to reject the settlement); (*see generally* Volkswagen Br. § IV.D.2.) Thus, *Passavant*

[3] Volkswagen's Opening Brief, filed January 9, 2017, is abbreviated as "Volkswagen Br." herein.

must be read to allow employers—at least in some circumstances—to repudiate unlawful conduct without an admission of wrongdoing.

To the extent that *Passavant* even requires the Board to take notice of an employer's failure to admit wrongdoing, it treats the lack of such an admission merely as one piece of evidence relating to particular elements of its test: whether the repudiation was specific and whether the repudiation was unambiguous. *Passavant* involved a supervisor who unlawfully told employees that they would be fired if they participated in an economic strike. 237 NLRB at 138-39. The employer sought to repudiate the supervisor's unlawful conduct by publishing a statement in its employee newsletter. *Id.* The Board found the employer's attempted repudiation insufficient because it failed to satisfy five of the *Passavant* elements. *Id.* at 139. Regarding two of those elements—whether the repudiation was unambiguous and whether it was sufficiently specific—the Board supported its reasoning with three pieces of evidence: (1) the employer did not admit wrongdoing, instead merely informing employees that they had been given information that was "not correct"; (2) the employer did not name the supervisor who made the offending statement; and (3) the employer did not mention the circumstances in which the supervisor made the statement. *Id.* Thus, the *Passavant* Board considered the employer's failure to admit wrongdoing as merely one of many pieces of evidence relating to the ultimate question of whether the employer's repudiation was sufficiently specific and unambiguous.

By that standard, Volkswagen's Notices were sufficiently specific and unambiguous to satisfy the *Passavant* test. As explained in Volkswagen's Opening Brief, the Notices clearly identify the Agreement, explain the Regional Office's view that employees would construe the Agreement to restrict their right to file Board charges, and modify the Agreement to make absolutely clear that it does *not*, in fact, restrict employees' right to file Board charges.

(Volkswagen Br. § III.B.) Thus, although Volkswagen did not expressly admit wrongdoing, it did far more than the employer in *Passavant*. Rather than vaguely stating that one of its policies was "not correct" without identifying any of the surrounding circumstances, Volkswagen made made absolutely clear to employees what policy was at issue, why the Regional Office found it to be objectionable, and what specific language Volkswagen was adding to the Agreement to address the Regional Office's objection. (*Id.*) On this record, the Board should find that Volkswagen's Notices are specific and unambiguous even though they do not expressly admit wrongdoing.

B. To the Extent Some Board Decisions Purport to Require Employers to Admit Wrongdoing, They Misapply *Passavant*.

Although some Board decisions purport to require that employers admit wrongdoing, the Board should not follow those decisions because they do not properly apply the *Passavant* rule. Moreover, those cases are factually dissimilar from the situation in this case.

Some Board decisions have suggested, or even expressly purported to find, that *Passavant* requires an employer to admit wrongdoing. *Lily Transp. Corp.*, 362 NLRB No. 54, slip op. at 9 (Mar. 30, 2015) (ALJ opinion, adopted by Board in relevant part) (expressly stating that employer must admit wrongdoing); *DirecTV U.S. DirecTV Holdings, LLC*, 359 NLRB 545, 548 (2013) (same), *vacated but then incorporated by reference in* 362 NLRB No. 48, slip op. at 1 (2015); *LA Film Sch., LLC*, 358 NLRB 130, 138 (2012) (ALJ opinion, adopted by Board) (same); *Pride Ambulance Co.*, 356 NLRB 1023, 1028 (2011) (same); *Ark Las Vegas Rest. Corp. v. Nat'l Labor Relations Bd.*, 334 F.3d 99, 108 (D.C. Cir. 2003) (enforcing Board decision) (same); *Holly Farms Corp.*, 311 NLRB 273, 274 (1993) (same); *see also Voith Indus. Servs., Inc.*, 363 NLRB No. 116, slip op. at 4 (Feb. 17, 2016) (susceptible to reading that employer must admit wrongdoing); *Holdings Acquisition Co. L.P.*, 356 NLRB 1151, 1152 (2011) (same);

Webco Indus., Inc., 327 NLRB 172, 173 (1998) (same); *Wells Aluminum Corp.*, 319 NLRB 798, 809 (1995) (ALJ opinion, adopted by Board) (same), *rev'd on other grounds*, 113 F.3d 1236 (6th Cir. 1997); *Branch Int'l Servs.*, 310 NLRB 1092, 1105-06 (1993) (ALJ opinion, adopted by Board) (same). However, none of those decisions announced a new rule governing repudiations; rather, every one of those decisions ultimately relies on *Passavant* itself as the source of the repudiation test.

For example, *Holly Farms* baldly stated that the employer "did not admit to any wrongdoing, as required under *Passavant.*" *See* 311 NLRB at 274; *see also Pride Ambulance*, 356 NLRB at 1028 (citing only *Passavant*); *Webco*, 327 NLRB at 173 (same); *Wells*, 319 NLRB at 809 (same); *Branch*, 310 NLRB at 1105-06. Likewise, in *Ark Las Vegas*, the D.C. Circuit stated that the NLRB's law of repudiation requires "the employer [to] admit wrongdoing," but its only authority for that proposition was none other than *Holly Farms*. 334 F.3d at 108; *see also Voith*, 363 NLRB No. 116, slip op. at 4 (citing *Holdings Acquisition*); *Lily*, 362 NLRB No. 54, slip op. at 9 (citing *DirecTV*); *DirecTV*, 359 NLRB at 548 (citing *Holdings Acquisition* and *Ark Las Vegas*); *LA Film Sch.*, 358 NLRB at 138 (citing *Holly Farms*); *Holdings Acquisition*, 356 NLRB at 1152 (citing *Holly Farms*). Thus, every one of the decisions stating that an employer must admit wrongdoing ultimately purports to find that requirement in *Passavant* itself, either by directly citing *Passavant* or by citing a line of decisions that traces back to *Passavant* (through *DirecTV*, *Ark Las Vegas*, *Holdings Acquisition*, and ultimately *Holly Farms*). But as described above, that is not correct: no element of the *Passavant* test requires that the employer admit wrongdoing. And, as explained above and in Volkswagen's Opening Brief, the Board must apply the plain language of its own rules; the Board cannot apply the *Passavant* test *as if* it required an employer to admit wrongdoing when none of the seven elements of the *Passavant*

test so require. (*See generally* Volkswagen Br. § IV.D.2). The Board decisions described above do not change that result. *Cf. Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. Nat'l Labor Relations Bd.*, 253 F.3d 19, 26 (D.C. Cir. 2001) (if "the NLRB adopts an unreasonable position," courts will overturn it despite that it took the same position in prior cases).

Even aside from whether the above-cited cases properly apply *Passavant*, all of the above-cited cases involve factual scenarios that are drastically different from the situation in this case. In some of the cases, the employer failed to publish any notice or provide any explanation to its employees whatsoever, instead claiming that its unfair labor practice should be excused merely because it had changed its rules or abandoned the unlawful practice. *Lily*, 362 NLRB No. 54, slip op. at 8-9 (employer revised offending work rules without explanation); *Ark Las Vegas*, 334 F.3d at 107-08 (employer reinstated suspended employee and rescinded offending work rule without explanation); *Webco*, 327 NLRB at 172-73 (employer reinstated suspended employee without explanation). There is no question that the failure to give any explanation whatsoever cannot be sufficiently specific and unambiguous to satisfy *Passavant*. But that is not what happened here. As described above, Volkswagen issued a clear notice that described the policy at issue, the Regional Office's objection, and what Volkswagen was doing to address that objection. Cases dealing with employers who failed to give any explanation whatsoever should not apply here.

In most of the remaining cases, the employer did issue an explanation, but that explanation did not make clear that the employer was changing its conduct or policies. Instead, the explanation purported to correct employees' "confusion" or "misunderstanding" of the employer's conduct or policies. *LA Film Sch.*, 358 NLRB at 137-38 (memo purported to "clear up a misunderstanding" in which supervisor's statement was "misinterpreted" by employees as

prohibition on participating in union activity); *Holdings Acquisition*, 356 NLRB at 1152-53 (previous day's directive to remove union buttons was a "misunderstanding"); *Pride Ambulance*, 356 NLRB at 1028 (employer told striking employees they were fired and then sent a letter purporting to resolve "confusion" over whether they were fired); *Wells*, 319 NLRB at 809 (new rules issued to resolve "confusion" over old rules); *Branch*, 310 NLRB at 1105-06 (employer's refusal to bargain was a "misunderstanding"); *Holly Farms*, 311 NLRB at 274-75 (employer's speech sought to put to rest "rumor" that wage increase was given in order to interfere with union election).

Clearly, *Passavant*'s requirement that repudiations be specific and unambiguous precludes an employer from engaging in this type of subterfuge, in which the employee is blamed for a "misunderstanding" in order to obscure the fact that the employer has changed its rules. But that is not what happened in this case. In contrast, Volkswagen's Notices do not refer to any type of "misunderstanding," "confusion," or "rumor." Rather, they explain the Regional Office's view that the Agreement is not explicit enough about employees' right to file Board charges, and they inform employees that a change is being made to the Agreements to address the Regional Office's concern. Unlike the employers in the above cases, Volkswagen has not attempted to somehow disguise its policy change or blame it on its employees. Thus, those cases should not control the outcome of this dispute.

The last two cases should also be distinguished from the facts here. In those cases, although the employer did not necessarily place blame on the employees, the employer nonetheless failed to make clear that it intended to change its conduct or policies. In *Voith*, a supervisor acknowledged to employees that the Board had informed him that he must recognize a particular union, but also stated that "no one was going to tell him who would represent [the]

employees," thus leaving employees to wonder whether he would recognize that union or not. *See* 363 NLRB No. 116, slip op. at 3-4. Similarly, in *DirecTV*, the employer informed its employees that it was "clarify[ing]" its "intent" in "enforcing" its allegedly unlawful policies. 359 NLRB at 548. The implication, of course, is that the employer was not changing its policies at all, and in fact could change its "intent" and enforce the policies as written at any time. *See id.* Here, Volkswagen's conduct suffered from neither of those ambiguities. Again, Volkswagen made clear that it was modifying its Agreement to resolve the objections raised by the Regional Office. It did not make conflicting representations regarding whether it intended to change the Agreement, and it did not merely speak of its "intent" regarding the Agreement; it issued straightforward Notices that actually effected an amendment to the Agreement. Thus, *Voith* and *DirecTV* should not apply here, either.

For the foregoing reasons, the cases purporting to require that an employer admit wrongdoing do not faithfully apply the *Passavant* test and are factually distinct from the situation in this case. Therefore, the Board should not apply those cases here.

C. The Board Has Repeatedly Found Repudiations to Be Effective in Cases in Which the Employer Did Not Admit Wrongdoing.

Finally, any purported requirement that the employer admit wrongdoing is belied by other decisions in which the Board found a repudiation to be effective despite that the employer did not admit wrongdoing.

In *Broyhill Co.*, the employer's notice stated only that "a supervisor . . . *may have* acted in an improper manner," but the Board nonetheless found the repudiation to be sufficient. 260 NLRB 1366, 1367-68 (1982) (Members Fanning and Jenkins, dissenting in relevant part and faulting the Board for not rejecting the repudiation on this basis). Likewise, in *Stanton Industries, Inc.*, 313 NLRB 838, 848-49 (1994), the Board adopted an ALJ's opinion upholding a

repudiation that included the caveat that the employer "has not established that these alleged threats [to close the plant] occurred or are true," that *if* the statements were indeed made, "we regret them" and they "do not reflect [the company's] views," but that, in any event "the Company did not threaten to close the plant." Additionally, in *Extendicare Health Services, Inc.*, the Board adopted an ALJ's decision upholding a repudiation that merely stated that the employer had "been advised" by the Regional Director that a meal price increase was improper, that the Regional Director had "requested" that the company rescind the price increase, and that the company was "honoring the Regional Director's request." 350 NLRB 184, 193 (2007); *see also Gaines Elec. Co.*, 309 NLRB 1077, 1080-81 (1992) (repudiation was sufficient where it disavowed any "express or inferred threats" as "unlawful," but did not specifically admit that any threats were made, and suggested that, perhaps, any perceived threats were merely an "impression" in employees' minds). These cases make clear that no admission of wrongdoing is necessary to meet the criteria set forth in *Passavant*.

In addition, interpreting *Passavant* to require employers to admit wrongdoing would be inconsistent with the Board's stated policies and goals. As noted in Volkswagen's Opening Brief, the Board seeks to promote voluntary compliance with the law, as well as settlement of cases. *See* Casehandling Manual § 10124.1. Certainly, cases may arise in which the Regional Office believes that an employer violated the law but the employer disagrees. In such cases, the employer may nonetheless decide, in order to avoid a dispute with the Regional Office, simply to repudiate its actions.[4] But if an employer were required to admit wrongdoing in order to make its repudiation effective, far fewer repudiations would occur. Employers would not take the risk of admitting wrongdoing, thereby waiving their legitimate legal arguments and potentially

[4] Indeed, in this case, Volkswagen believed the Agreement to be lawful but nonetheless issued the Notices in order to avoid a conflict with the Regional Office. If Volkswagen had been required to admit wrongdoing in the Notices, it would not have issued them.

exposing themselves to remedial action by the Board in the event that their repudiation is found to be defective in some manner. Further, an explicit admission of wrongdoing could result in negative publicity and perhaps even civil liability in some cases. It would be a rare employer indeed who would give up what it believes to be a valid legal defense in favor of making such an admission.

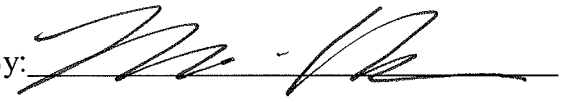
In sum, the foregoing cases demonstrate that *Passavant* does not in fact require an employer to admit wrongdoing in order to repudiate its allegedly unlawful conduct. Those cases comport with both the plain language of *Passavant* and the Board's stated policy of encouraging voluntary remediation and settlement. Thus, the Board should follow those cases, and not the cases cited in the previous section, which it should distinguish both on the law and on the facts. Moreover, for the reasons described in this Response Brief and Volkswagen's Opening Brief, the Board should conclude that Volkswagen's repudiation was sufficient because it met all of the elements of the *Passavant* test, even though it did not expressly admit wrongdoing.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in Volkswagen's Opening Brief, Volkswagen respectfully requests that the Board rule in its favor and grant it the relief requested in the conclusion of its Opening Brief.

Dated: January 23, 2017

Respectfully submitted,

By: 

W. Scott Porterfield
Lynne D. Mapes-Riordan
James R. Vogler
Michael J. B. Pitt
BARACK FERRAZZANO
KIRSCHBAUM & NAGELBERG LLP
200 W. Madison Street, Suite 3900
Chicago, IL 60606
Tel: (312) 984-3100
Fax: (312) 984-3150
scott.porterfield@bfkn.com
lynne.mapes-riordan@bfkn.com
jim.vogler@bfkn.com
michael.pitt@bfkn.com

Attorneys for Volkswagen Group of America, Inc. and VW Credit, Inc.

CERTIFICATE OF SERVICE

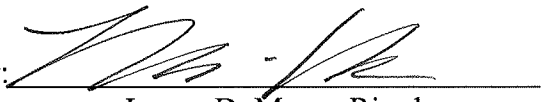
The undersigned, an attorney, states that on **January 23, 2017**, she caused **Volkswagen Group of America, Inc.'s and VW Credit, Inc.'s Response to the General Counsel's Brief** to be served to the following addresses:

via hand delivery and email:

Andrea James, Esq.
Field Attorney
National Labor Relations Board
Region 13
209 S. LaSalle St., Suite 900
Chicago, IL 60604-1443
Andrea.James@nlrb.gov

via overnight mail and email:

Michael J. Lingle, Esq.
Sarah E. Cressman, Esq.
693 East Ave.
Rochester, NY 14607-2152
mlingle@theemploymentattorneys.com
scressman@theemploymentattorneys.com

By: 
Lynne D. Mapes-Riordan